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IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No. 76

JAMES E. MARKHAM, Alien Property Custodian, and W. ALEXANDER JULIAN, Treasurer of the United States,

Petitioners,

against

HARTWELL CABELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

HARTWELL CABELL,
Respondent Pro se.

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BRIEF FOR RESPONDENT

Summary of Argument

The questions to be discussed are raised by a motion to dismiss the Amended Complaint filed by the plaintiff in the District Court. The motion recited four grounds for dismissal (Tr. 7-8). The third and fourth grounds, designated (c) and (d) in the notice of motion, were, on argument formally withdrawn by petitioners' counsel (defendants below, Tr., p. 1), and do not concern us here. The remaining grounds designated as (a) and (b) read as follows:

"(a) The amended complaint shows that the alleged debt upon which plaintiff's claim is based, was not owing to or owned by the plaintiff prior to October 6th, 1917, as required by Section 9(e) of the Trading With the Enemy Act as amended;

(b) The amended complaint discloses that a notice of the alleged claim could not have been filed or an application made with respect thereto prior to the date of the enactment of the Settlement of War Claims Act of 1928, as required by Section 9(e) of the Trading With the Enemy Act as amended."

In both lower courts, the plaintiff opposed the motion to dismiss on two grounds. The first was that the various forms in which the amendment 9(e) was first enacted and thereafter reenacted, until it took final form in 1928 as part of the Settlement of War Claims Act, clearly indicated that the Congress intended to confine its application to claims against enemy property taken over by and in possession of the Alien Property Custodian during World War I, and that as to future wars and property of enemies seized during such wars, the provisions in Section 9(a) of the Trading With the Enemy Act which gave certain rights to United States citizens and citizens or subjects of our allies, with respect to enemy property, remained in force as an integral part of the general statute entitled the Trading With the Enemy Act which was first enacted October 6th, 1917.

The second ground urged by plaintiff below was that the claim sued on was not a mere debt; that the endorsement on the claim itself by the Italian insurance company, which was filed with the New York Superintendent of Insurance, while the assets of the American Branch of Assicurazioni Generali were in his possession for liquidation under the New York Laws, and before a state of war existed between the United States and Italy, was in effect an equitable assignment of these assets up to the full value of the claim, with interest until paid.

Since the Circuit Court of Appeals unanimously held that Sub-Section 9(e) of the Trading With the Enemy Act was confined in its application to debts owed to former enemy owners of property seized by the Alien Property Custodian during World War I, and left a full right of recovery upon a simple debt under Sub-division 9(a), the contention by the plaintiff below that his claim was based upon a property right and not a more debt was not necessary for a determination of the case in his favor, and the Court did not pass upon that question or even mention it in its opinion. Under the broad jurisdiction conferred upon this Court in certiorari proceedings (28 U. S. C. Sec. 347(a)), we believe this point is open to consideration by this Court.

ARGUMENT

I

The several arguments contained in the Government's brief upon the basis of which this Court is urged to hold that Section 9(e) of the Trading With the Enemy Act as finally amended applies to the claim against enemy property upon which this suit was brought are each of them directly opposed to concepts which form the basis of our form of government and for that reason are untenable.

There is little to add to the comprehensive opinion of the Court below, in its treatment and application of the decision of this Court in the leading case (*Holy Trinity Church* v. *U. S.*, 143 U. S. 457), and the numerous decisions cited by the Court in its opinion, in which the rule of statutory construction announced in that case has been repeatedly reaffirmed and enforced by this Court.

In the *Holy Trinity Church* case, by the unanimous decision of this Court, the fundamental rule in construing

statutes as announced in the opinion of Mr. Justice BREWER is to ascertain and give effect to legislation, but that where an adherence to the strict letter would lead to injustice, to absurdity or to contradictory provisions, it is the duty of the Court to ascertain the true meaning and be guided thereby in its decision.

In *Ozawa* v. *United States*, 260 U. S. 178, the Court had before it the construction of a statute controlling the naturalization of foreigners. The Court, in an opinion announced by Mr. Justice SUTHERLAND, said (p. 194):

> "It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

One of the cases cited by the Court below deserves a word of explanation, since this Court in that case by a vote of five to four applied the rule laid down in the *Trinity Church* case to the facts before it. We refer to the case of *United States* v. *American Trucking Corporation*, 310 U. S. 534 (1940), which is cited in the Government's brief (p. 23). An examination of the reports show that the correctness of the doctrine of the *Trinity Church* case was not questioned by any member of the courts which considered the case, but the minority of four justices of this Court agreed with the decision of the Circuit Court of Appeals in holding that the facts before them did not call for its application. Five of the members of this Court took the other view and the rule of construction laid down in the *Trinity Church* case was applied.

By way of preface to our consideration of the arguments advanced to overturn the decision of the Court below, several axioms that lie at the basis of our form of government must be borne in mind. The sovereign powers of our federal government are distributed between the Congress, the Executive Department and the Federal Judiciary. To Congress is given the power of federal legislation subject to limits fixed by the Constitution. The Federal Judiciary is clothed with the duty of interpreting and enforcing provisions of the Constitution and the Acts of Congress. Our courts may apply and enforce the constitutional limitations to laws adopted by Congress, but in their interpretation or enforcement of a statute passed by the Congress which has become a law, they are bound by the purpose and intent of the legislative branch of the government in framing and adopting that law. They can neither ignore such intent when plain, nor supply deficiencies in the law as passed. The doctrine of the separation of powers of the executive, legislative and judicial branches of the government, is fundamental. One branch may not encroach upon either of the others except in so far as permitted by the Constitution. (See the Federalist, Nos. 47 to 51.)

This principal is axiomatic. In the words of Chief Justice MARSHALL: "The legislature makes, * * * and the judiciary construes the law." *Wayman* v. *Southard*, 10 Wheat. 1, 46.

In the *License Tax* cases, 5 Wall. 462, 469, Chief Justice CHASE, who delivered the opinion of the Court, said:

> "This court * * * has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here."

Let us apply these principles to this case. The Court below held that 9(e) was intended by Congress to apply solely to questions arising out of the seizure of enemy property by our government during World War I.

In the petition for certiorari in this case (p. 7) our adversaries say:

> "It is true that the limiting language of Section 9(e) was adopted *with reference to property vested during the last war.*" (Emphasis supplied.)

At the close of the argument of this case in the Circuit Court of Appeals, the presiding judge directly asked counsel who argued the case for the government, whether there could be any doubt that the intention of Congress in enacting 9(e) was to confine its effect to claims against enemy property seized during World War I, and the answer was unequivocally "No, there could be no doubt on that point."

Briefly epitomized, the arguments of our opponents for reversal of the Court below and the literal enforcement of 9(e), are as follows:—(a) That by the enactment of 9(e) Congress intended to eliminate from the Trading With the Enemy Act all remedies of creditors against enemy property seized by our government except claims against property seized in the First World War, leaving to some future Congress in the event of a future war to grant such rights to creditors as the Congress might deem expedient at that time.

(b) That by reason of the amendment of Section 5 of the Trading With the Enemy Act contained in the First War Powers Act 1941, which amendment authorized the seizure of non-enemy alien property, but which contained no remedial provisions as to such property in favor of American citizens, it would be grossly unfair and discriminatory to permit the exercise of remedies as to enemy property provided for in Sub-Section 9(a). To use the

exact language employed (Government's brief, p. 7), "they would, for example, afford no remedy for creditors of friendly aliens whose property may have been vested for protective or conservatory purposes only, and at the same time they would permit creditors of enemies to interfere with the wartime utilization by the United States of property in this country of enemy origin."

(c) That to hold that Section 9(a) is still in force and in view of the decisions of the courts following the First World War that the controlling principle of payment of debts out of enemy property is "first come first served," is to invite a multiplicity of suits which would result in a disorderly administration of enemy property in the hands of the Alien Property Custodian.

(d) That the office of Alien Property Custodian has been operated during the present war upon the assumption that Congress has purposely abstained from adopting a law of procedure until problems of war settlements and international relations growing out of enemy property seizures and vestings under Section 5 as amended, can be dealt with at the same time, and such an assumption when acted on by the administrative branch of our government should control this Court.

These arguments will be dealt with in the order named:

(a)

That the Trading With the Enemy Act was intended as a general statute to control not only the war in progress at the time of its enactment, but any and all wars that might occur in the future, needs no argument. In the law itself as originally passed, any provisions intended to be limited in its effect to the then current war contained words indicating that purpose. For instance, Section 3(d) reads: "*Whenever during the present war,* the President shall

deem that public safety demands it, etc." Section 11 reads: "*Whenever during the present war* the President shall find the public safety so requires and shall make proclamation thereof, etc." (see also the same language used in Sections 13 and 14).

An examination into the circumstances under which original Section 9 became Sub-Section 9(a) and Sub-Sections 9(b) to 9(q), both inclusive, were added from time to time, reveals clearly that everyone of these Sub-Sections related to property taken over in the First World War. For example the general law as originally enacted named no particular enemy, but merely used the term "the enemy," so as to bring the law into force regardless of who might be our enemies in future wars. In the sub-sections, the enemies intended to be affected by the amendments are named specifically as Germany, Austria, Hungary, or Austria-Hungary. Finally 9(e) is in 1928 engrafted as an integral part of the Settlement of War Claims Act. This later act was obviously passed, not as a general statute, but as a special statute to control the ultimate disposition of the German, Austrian and Hungarian property then in the hands of the Alien Property Custodian.

The language of 9(e) itself ties the enactment into this special statute. It provides:

> "Nor shall a debt be allowed *under this Section unless notice of the claim has been filed or application therefor has been made prior to the date of the enactment of the Settlement of War Claims Act of 1928.*" (Emphasis supplied.)

This obvious intention of Congress in adopting 9(e) to confine its application to claims against enemy property seized during World War I, has, as we have pointed out *supra*, been frankly admitted in the petition for certiorari in this case (p. 7):

> "It is true that the limiting language of Section 9(e) was adopted with reference to property vested during the last war."

Yet, in spite of this admission, our adversaries insist that the device employed by Congress to effectuate that limitation, operated by its terms to deprive the general language of Sub-Section 9(a) of any continuing vitality it might otherwise have had.

In *Banco Mexicano* v. *Deutsche Bank,* 289 Fed. 924, the Court of Appeals of the District of Columbia had before it a question involving the construction of Sub-Section 9(e). The claim upon which that case was based arose out of World War I. The only question was whether plaintiff, a Mexican bank and therefore an alien, was limited in its right to recover by the provision in the subsection requiring proof that the claim arose with reference to money or other property held by the government officers. In the course of its opinion, page 298, that Court said:

> "Sub-Section (a) is an enabling enactment granting certain remedies to certain parties; while Sub-Section (e) is a limiting or restricting enactment designed to cut down the provisions of Sub-Section (a)."

In that case, since the property was seized during World War I, the Court applied the limitation and held that since Sub-Section (e) restricted the right to collect a debt against enemy property by claimants other than citizens of the United States to debts which had arisen with reference to money or other property held by the Alien Property Custodian or Treasurer of the United States under the Act, and there was no proof of this fact.

The case was appealed to the Supreme Court of the United States, 263 U. S. 591, which Court, after specifically stating the ground of decision in the Court below as quoted above, said: "We concur". (see p. 601.).

It is submitted that an addendum to a general law which, as to certain claims, limits the remedy prescribed in the law as originally enacted, in the absence of express language indicating a different purpose, is a mere restriction, and when not applicable, by its terms, to a given case, leaves the original law in full force as to that case.

(b)

The next argument is that in view of the amendment of Section 5 of the Trading With the Enemy Act by the First War Powers Act (1941), whereby the President is authorized to seize non-enemy alien property, to hold that 9(a) is in force will cause discrimination among classes of creditors of aliens and will greatly interfere with the use by the United States of the property of aliens seized during World War II.

In the argument on this point enemy property and property of alien governments and their citizens (non-enemy) seem to be grouped together as one class. There is no authority for this classification.

In the first place—the remedies allowed creditors by Sub-Section 9(a) are expressly restricted to enemy property. The language of the section is:

> "Any person not an enemy or ally of enemy • • • to whom any debt may be owing from an enemy or ally of enemy • • • may file with the said Custodian a notice of his claim under oath, etc."

The right of a nation to seize enemy property in wartime is universally recognized. The seizure once being effected, a sovereign may do with such property whatever it wishes. It may confiscate it, destroy it, sell it or use it for any purpose whatever. The former owners of such property have no redress. If a sovereign allows its own subjects or citizens or those of friendly countries to be paid out of such property any debt that may be due them

from the former owners of the seized enemy property, there is nothing to prevent it, and if errors occur in connection with such payments, there is no liability to anyone on the part of the sovereign.

The foreign owned property which has been seized by the government under the powers granted by Section 5 of the Trading With the Enemy Act, as amended, by the First War Powers Act (1941), comes under another category. The right of a sovereign to seize and convert to his own use either in war or in peacetime any property of its own citizens or friendly aliens where such property is within its jurisdiction, is derived from the sovereign power of "eminent domain." That power in many countries is unlimited. In the United States it is limited by the Fifth Amendment of the Constitution which provides:

> "* * * Amendment 5, * * * Nor shall anyone * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

In *Jacobs* v. *United States*, 290 U. S. 13 (1933) it was held that the obligations of the United States to pay just compensation for private property taken by eminent domain rests upon the Fifth Amendment independent of any statute or express promise. A promise was held to be implied because of the duty imposed by the amendment.

In *Becker Steel Co.* v. *Cummings*, 296 U. S. 74 (1935) and also *Cummings* v. *Deutsche Bank*, 300 U. S. 115, it was held that such a promise was implied where the property of a non-enemy alien has been seized under the Trading With the Enemy Act as enemy property.

In *Searl* v. *District No. 2*, 133 U. S. 553, 562, this Court held that the right of eminent domain is an incident of sovereignty and requires no constitutional recognition, and in *United States* v. *Jones*, 109 U. S. 518, it was held that this clause in the Constitution which provided for just

compensation for property taken is merely a limitation upon the use of the power of eminent domain.

In *United States* v. *Lynah*, 188 U. S. 445, the doctrine of eminent domain was again defined. The Court there held that all private property is subject to the necessities of government and that the right of eminent domain underlies every element of property right. The decision was that the government may take personal or real property whenever its necessities or the exigencies of the occasion demand; but that the Fifth Amendment of the Constitution guarantees that when this governmental right of appropriation, this asserted paramount right is exercised, it must be attended by compensation.

In *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931), it was expressly held that where our government takes property of an alien friend by eminent domain, it must pay the equivalent of full value thereof. The Court there held that the fact that property of our citizens may be confiscated in that alien's country does not subject alien friends' property to confiscation here.

The powers granted to the President under Section 5 of the Trading With the Enemy Act are far beyond freezing or even custodianship. The language of the enactment is:

> "During the time of war or during any other period of national emergency declared by the President, * * * any property or interest of a foreign country or national thereof shall vest, when, as, and upon the terms directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of this purpose."

These broad powers clearly bring the seizure of alien non-enemy property within the exercise of the power of eminent domain by our government as limited by the Fifth Amendment of the Constitution of the United States. The obligation imposed upon the government by that amendment is to make "just compensation."

Is this language broad enough to allow the government to determine amounts due from the alien owners of property seized under Section 5 as amended in *ex parte* hearings, pay the same out of the seized property, and tender the evidence of such payment as a part of the "just compensation" itself? Where claims have been allowed and paid which it develops afterwards were barred by some foreign law or statute, where claims themselves are fraudulent or grossly exaggerated, or where payments have been made to the wrong person, the executives of our government may find themselves in many awkward positions.

An interesting sidelight on the situation which bears every indication that some such thoughts have occurred, at least to some of our Congressmen, is revealed on an examination of three bills that have been introduced in Congress since the amendment of Section 5 was adopted. The first was a bill (H. R. 4840) introduced on May 19th, 1944, entitled "A Bill to Amend First War Powers Act 1941." The second (H. R. 5031), with a similar title, was introduced on June 15th, 1944. Both these bills contain provisions allowing the filing of claims by American citizens against non-enemy property seized under the First War Powers Act. The machinery was set up for their allowance by the government officials and payment out of the seized property.

We are informed that neither of these bills was reported out of Committee and that they are to be considered as dead.

The third bill was introduced in the present Congress on July 10th, 1945. It is still before the Committee on

Judiciary in the House of Representatives awaiting action by that Committee before it goes before the House. There is no provision in this last bill for the allowance, determination or payment of claims of American citizens by the Alien Property Custodian. In place of that, the bill provides that where property is to be returned a notice of that fact shall be published in the Federal Register at least thirty days before the actual return. This notice is to specify the place where the property or interest or proceeds to be returned are located. The bill further provides that after the publication of such notice, the property or interest shall be subject to attachment at the suit of any citizen or resident of the United States or any corporation organized under the laws of the United States or any state, territory or possession thereof, or the District of Columbia. This new bill is drawn, clearly to avoid the difficulties which we have mentioned above. Its effect is to turn over to a court of competent jurisdiction the determination of the amount of the claim, and the payment is to be made in satisfaction of a judgment properly rendered by that Court.

It is respectfully submitted that the argument entirely overlooks the fact that assets seized as enemy property and assets of non-enemy aliens vested under the power of eminent domain, cannot be treated on the same basis when it comes to the allowance and payment of debt claims against former owners of such property especially where there is no showing that the provisions of Amendment 5 of the Constitution have been complied with.

(c)

It is argued by our adversaries that Sub-Section 9(a) should be held as no longer in force, so far as debt claims are concerned; that to hold otherwise, in view of the decisions of our courts in cases arising out of World War I, which granted priority in payment to diligent creditors,

"would result both in disorderly administration of vested property and inevitable inequities among creditors" (Government's brief, pp. 18-19).

A perusal of the footnote on page 19 of that brief would seem to imply that with Sub-Section (a) in the wastebasket, the Alien Property Custodian will have the authority to invest himself with all the powers of a bankruptcy court in the distribution of assets in his possession; that he can receive and classify claims against a given piece of property and hold the same in abeyance for an indeterminate length of time; that he may pay claims in full which he should conclude were entitled to preference, and distribute any balance among creditors of other classes on what he might conceive an equitable basis where the assets were not sufficient to pay everything in full. Incidentally, the fact that the debtor, outside of the seized property here may be amply solvent, is not taken into account.

It is sufficient answer to this argument to call the Court's attention to the authorities cited above, which hold that Congress alone is vested with the power of federal legislation. Unless authorized by an act of Congress such a procedure by an executive officer of the government would be a direct usurpation of the power to legislate and therefore void.

(d)

It is insisted that the office of Alien Property Custodian has been operated during the present war upon the theory that Congress has purposely postponed the enactment of a law governing procedure as to both enemy property and property taken over by the government under Section 5 of the Trading With the Enemy Act, as amended by the First War Powers Act 1941, until problems arising with respect to both kinds of seizures could be dealt with at the same time, and that such assumption, when acted on by the ad-

ministrative branch of our government, should control the decision of this Court.

So far as assets taken over as belonging to non-enemy aliens are concerned, we need only call attention to our argument under I(b) (*supra*).

Under the sound construction of 9(e) contained in the decision of the Circuit Court of Appeals in this case, supported as it is by the decisions of this Court, the fact that the Alien Property Custodian and his legal advisers have made and acted upon the mistake of assuming that the enactment of Sub-Section 9(e) had the effect of destroying remedies of American creditors of enemies whose properties have been taken over during World War II granted by Sub-Section 9(a), furnishes no ground for a refusal to enforce the provisions of 9(a) in a proper case.

II

The plaintiff's suit is based not upon a mere debt claim, but under the facts alleged in the amended complaint and admitted by the motion an equitable assignment whereby a property right in the funds in the possession of the New York Superintendent of Insurance was created and is vested in plaintiff below.

Facts

The following are the facts as alleged in the amended complaint (Tr., p. 2, *et seq.*).

On July 25th, 1941, the assets of the United States Branch of the Assicurazioni Generali di Trieste e Venezia, hereinafter referred to as the "Italian Company," were taken over by the New York Superintendent of Insurance for liquidation. These assets exceeded by something like $2,000,000 the total liabilities of the American Branch.

Thereafter and in due course Cabell & Cabell, a firm of New York lawyers who had represented the Italian Company and its United States Branch for a number of years, filed a claim with the New York Liquidator for services and disbursements in the sum of $21,848.89. The claim as filed was endorsed as follows:

> "The above claim for services and disbursements by Cabell & Cabell, has been submitted to the Home Office of Assicurazioni Generali and has been approved.
>
> (Signed) Assicurazioni Generali
> By Dr. Ignazio Hornik."

Dr. Ignazio Hornik was, from its inception in 1935, the Manager of the United States Branch of the Italian Company, and also held an office equivalent to that of Vice President on the Home Office General Staff of the Italian Company.

The New York Liquidator allowed and paid $14,848.89 of the claim as filed, and disallowed the balance of $7,000 upon the ground that the items of the account covering services and disbursements to this amount had been rendered or advanced by Cabell & Cabell to the Home Office of the Company, and for that reason could not be paid by him as Liquidator of the New York Branch. He was sustained by the New York Courts.

On December 11, 1941, war was declared between the United States and Italy.

On October 7, 1942, by vesting order 218, Leo T. Crowley, the then Alien Property Custodian of the United States, vested in himself as such Alien Property Custodian, all funds and properties in this country belonging to the Italian Company, including what might remain of the assets of the United States Branch after payment by the Liquidator of the claims against such branch, plus the liquidating expenses.

Thereafter, a notice of the claim of Cabell & Cabell was duly filed with the Alien Property Custodian, as required by law.

The prayer for relief in the amended complaint is that the defendants be directed "to pay to the plaintiff out of the assets of the former United States Branch of the Assicurazioni Generali di Trieste e Venezia, in their possession or under their control the sum of $6,922.02, with interest thereon at 6% from July 25th, 1941."

The slight difference in these figures from those in the claim as filed with the Liquidator, was due to an adjustment of estimated disbursements to actual disbursements.

Our contention is that the above facts constitute an equitable assignment of so much of the residue of funds of the United States Branch as were necessary to pay the amount admittedly due, plus 6% interest thereon; that said assignment, since it became effective prior to the declaration of war between the United States and Italy and prior to the vesting order of the funds of the Italian Company in this country issued by the Alien Property Custodian, was not affected either by the state of war or the vesting order.

An equitable assignment has been defined in 5 Corpus Juris 837 as "such an assignment as gives the assignee a title which, although not cognizable at law, equity will recognize and protect. It is in the nature of a declaration of trust and is based on principles of natural justice and essential fairness without regard to form."

In *Curtis* v. *Walpole Tire & Rubber Co.*, 218 Fed. 145, the facts were as follows: Curtis had advanced to the Walpole Tire & Rubber Co. certain moneys to meet their obligations, and in acknowledgment of the debt, was given a note. In addition to the note an order was sent to the Foster Rubber Co., a corporation which owed a consider-

able sum of money to the Walpole Company directing the former company to pay Curtis out of the money then or thereafter due to the Walpole Company. Thereafter the Walpole Tire Company went into the hands of a receiver, and the case came before the United States Circuit Court of Appeals for the First Circuit, upon the question as to whether Curtis had an enforceable interest in moneys which had been collected by the Receiver from the Foster Rubber Company on accounts due by that Company to the Walpole Tire & Rubber Co.

The lower Court refused to allow a preference and classified the claimant as a general creditor. The Circuit Court of Appeals reversed that decision, holding that the transaction in effect amounted to an equitable assignment, and ordered the claim to be paid out of the funds paid to the Receiver by the Foster Rubber Company. The Court said, at page 148:

> "The Tire Company retained no right to collect the amount for its own benefit, or to revoke the disposition promised as to the future. The assignment and equitable interest in the amount as it then stood, and as it might thereafter accrue, passed to the claimant a security for his note, together with the power to collect the account and apply the proceeds in satisfaction of the note. As the assignment vested in the claimant an equitable interest in the account, with the power to collect the same, he thereby became possessed of a power, coupled with an interest in the account as assigned, which was irrevocable."

A most instructive case on this subject is *In re Dier*, 296 Fed. 816, decided by the Circuit Court of Appeals for the Third Circuit. In that case the Court carefully pointed out and defined the elements necessarily present to constitute an equitable assignment, and held that the elements presented by the facts of that case established such assignment. The Court held that in order to establish an equitable assignment:

"The intention of the assignor must be to transfer a present interest in the debt or fund or subject matter.

"What amounts to a present appropriation which constitutes an equitable assignment, is a question of intention to be gathered from all the language construed in the light of attendant circumstances.

"Any words or transactions which show an intention on the one side to assign, and an intention on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment.

"To constitute an assignment good even in equity there must be an actual or constructive appropriation of the subject matter, a perfected transaction between the parties, intended to vest in the assignee a present right; even where the circumstances do not admit of its immediate exercise."

An examination of the citations in the first *Corpus Juris* and in *Corpus Juris Secundum* under the text of those works defining equitable assignments, shows that as so defined our Federal and State Courts have with practical unanimity enforced such assignments. (5 *Corpus Juris*, p. 837, *et seq.*, 6 *Corpus Juris Sec.*, p. 1101, *et seq.*)

It is submitted that every element necessary to constitute an equitable assignment as defined and enforced by our courts under the decisions, is present in the instant case.

In the *Matter of People (Russian Reinsurance Company)*, 255 N. Y. 415, 424, where, by reason of world conditions similar to those in this case, the United States' assets of certain Russian Insurance Companies had been taken over for liquidation by the New York Superintendent of Insurance, the New York Court of Appeals said:

"There is no receiver at the domicile and the corporations are still solvent, willing, as well as able,

to pay their creditors in full. In such circumstances, the duty of the Superintendent is to pay the surplus to the legal owners, deducting a sum sufficient to pay his own expenses as well as intervening liens."

In this case we have an account for services and expenses rendered and to be rendered, the amount of which is agreed upon by both parties. This is followed by an endorsement on the account itself as presented to the Liquidator, signed by the company, affirming the correctness of the amount named in the account and approving its payment out of the assets belonging to them in his hands as liquidator of its American branch. These assets far exceeded the obligations of the company which under the laws of New York took precedence over foreign claims.

All this was done before war had been declared between the United States and Italy and more than a year before the vesting order seizing the company as enemy property was issued by the Alien Property Custodian.

The endorsement by the accredited officer of the insurance company of the approval by the home office of the claim for legal fees and disbursements filed by Cabell & Cabell with the New York Liquidator was in effect and to all intents and purposes a directive by the insurance company to the Liquidator to pay the claim. Had such a directive been filed with a private institution holding these funds, any disregard of the request would have been upon the institution's responsibility. This endorsement of approval by the insurance company can, therefore, be treated as being in the nature of an order to pay.

The effect of an equitable assignment under the decisions is to vest in the assignee an interest in the designated fund, where payment is not immediately available, equal to the amount agreed upon by the parties, with interest until paid.

As the acquirement of this property right in the American assets of the Assicurazioni Generali in the hands of

the Superintendent of Insurance, as liquidator, antedated by more than a year the seizure of the property by the Alien Property Custodian and as only a part of the amount admitted to be due and which was intended to be covered by the equitable assignment, has been paid by the Liquidator, it logically follows that to the extent of the unpaid balance this property right, owned by Americans, survives the seizure and is now enforceable.

Under the provisions of original Section 9, now Sub-Section 9(a) of the Trading With the Enemy Act, any person "not an enemy or ally of enemy, claiming any *interest, right* or *title* in any money or other property which may have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him hereunder" has the right after filing a notice of his claim to bring suit on the same if not paid, in a court of equity. (Emphasis supplied.)

It will be difficult by any stretch of the imagination to nullify this provision by an interpretation of the language of Section 9(e).

In a petition for a writ of certiorari entitled *Ehrich* v. *Eisenlohr,* it was sought to have this Court reverse the decision that had been rendered by the Circuit Court of Appeals of the Third Circuit, *In re Dier.* The writ was refused (*Ehrich* v. *Eisenlohr,* 265 U. S. 584).

In its opinion rendered *In re Dier,* the Circuit Court of Appeals carefully examined into the Pennsylvania State Court decisions upon the ground that the transactions claimed to constitute an equitable assignment had all taken place in that state.

In the instant case everything that we rely on took place in the State of New York, and an examination of the New York cases on the subject show that our State courts are entirely in line with the conception of an equitable assignment as defined in the *Dier* case.

In *Brill* v. *Tuttle*, 81 N. Y. 454, it was held that where an order addressed to a debtor directed that the money to be paid be charged to a certain account then existing in favor of the creditor under circumstances that showed that payments were to be made out of moneys due or to become due on the account, and that all the parties must have so understood it, such order constituted an equitable assignment of the fund. In that case the debtor had refused to act upon the order and voluntarily paid the amount he owed to the drawers of the order. The Court held that he did so "in his own wrong," and compelled him to account to the equitable assignee.

In *Lauer* v. *Dunn*, 115 N. Y. 405, under a contract between the defendant Dunn, as the owner of certain property, and one Hurley, for the construction of several buildings, the plaintiffs as subcontractors had furnished labor and materials. In part payment they had received from the contractor Hurley, a request addressed to Mr. Dunn in writing to pay to the subcontractor $700, and charge the same to the account. Dunn refused to accept this order and was sued by the subcontractor. The Court, on page 409, said:

> "After notice of this order, which was, as we have said, in effect an assignment of the contractor's interest in the moneys in the owner's hands, the owner was bound to apply the fund to its payment and to no other purpose. Such was the rule asserted in *Brill* v. *Tuttle*, 81 N. Y. 454, and which is well settled by authorities."

To the same effect are the decisions in *Bates* v. *Salt Springs National Bank*, 157 N. Y. 322; *Weniger* v. *Fourteenth Street Store*, 191 N. Y. 423; *Muller* v. *Kling*, 209 N. Y. 239.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals should be affirmed by this Court.

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